

July 2, 2002

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street S.W.  
Washington, D.C. 20554

**Re: Docket No. WC 02-89**

Dear Ms. Dortch:

Attached is the public version of the Minnesota Department of Commerce's ex parte filing in the above docket.

Sincerely,

/s/

Anthony Mendoza  
Deputy Commissioner  
Minnesota Department of Commerce

/s/

Steven H. Alpert  
Assistant Attorney General  
Attorney for the Minnesota Department of Commerce

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Qwest Communications International, Inc.	)	
	)	WC Docket No. 02-89
	)	
Petition for Declaratory Ruling On the Scope	)	
of the Duty to File and Obtain Prior Approval	)	
of Negotiated Contractual Arrangements	)	
Under Section 252(a)(1)	)	

The Minnesota Department of Commerce (Department) submits this permitted *ex parte* letter to the Commission to clarify the intent of its initial comments, address certain inaccurate statements by Qwest in its reply, and respond to Qwest’s “motion” in footnote 49 of its reply comments to strike portions of the Department’s comments.

Contrary to Qwest’s suggestions, the Department is not seeking to litigate here any of the issues currently pending in the Minnesota proceeding addressing Qwest’s failure to file secret interconnection agreements with the Minnesota Public Utilities Commission (“MPUC”).<sup>1</sup> The MPUC has jurisdiction over that case and will decide it based on the evidence presented there.

Rather, the Department brought Qwest’s conduct to the attention of the Commission so that the Commission can see for itself the kinds of agreements that Qwest seeks by its petition to exclude from the Telecom Act’s filing and non-discrimination requirements. In addition, the Department believes it is essential that the Commission understand how Qwest used its control of the network through these secret agreements to try to manipulate regulatory processes.

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<sup>1</sup> That proceeding is described in more detail in the Department’s comments and is referred to later in this letter as the “Unfiled Agreements Docket.” In Minnesota, it is captioned *In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197, OAH Docket No. 6-2500-14782-2.

The Department wants the Commission to understand that, if it grants Qwest's petition, there is a strong likelihood that Qwest will continue to engage in the kind of conduct that is evidenced by the documents provided to the Commission by the Department. The Department believes that conduct is illegal and against the public interest, particularly when it involves eliminating the participation of CLECs in the important question of whether Qwest should be given Section 271 authority to offer interLATA services in Minnesota or elsewhere.<sup>2</sup>

Not a single other ILEC filed comments or reply comments supporting Qwest's petition. Moreover, and despite Qwest's repeated assertions that its petition will clarify and better the business relationships between it and CLECs, not one CLEC supported Qwest's position either. Instead, every company that works with Qwest on a daily basis recognized Qwest's petition for what it is – an attempt to create new law allowing Qwest to circumvent the clear requirements of 47 U.S.C. §252 and, by extension, §251.

The lack of ILEC and CLEC support for Qwest's position should also serve to show the Commission that no one in the telecommunications industry other than Qwest is concerned about the many *bête noirs* that Qwest raises as scare tactics in its reply. No commenter other than Qwest, for example, believes that regulators are trying to micromanage the interconnection process. And no commenter other than Qwest believes that the state filing process is cumbersome or in any way prevents ILECs and CLECs from working together while interconnection agreements are pending approval.<sup>3</sup>

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<sup>2</sup> Qwest's reply argument that CLECs have no obligation to participate in Section 271 proceedings simply misses the point here. It is one thing for a CLEC to decide, independently, not to become actively involved in such proceedings because of a lack of resources or because an ILEC is meeting all of its obligations in an appropriate fashion. It is an entirely different (and much more insidious) thing for Qwest to purchase, with secret deals and benefits that are not made available to other CLECs or disclosed to the regulatory bodies considering Qwest's applications, agreements by two of its largest wholesale customers not to participate in such proceedings.

<sup>3</sup> To the contrary, as the Department pointed out in its opening comments, the filing process makes business much easier for CLECs that are able to immediately opt-into publicly available interconnection agreements instead of wasting time and other resources re-negotiating such agreements. This has proven especially true in Minnesota, where the majority of CLECs operating have opted into the agreement arbitrated between U S WEST and AT&T.

Moreover, it appears that many, if not all, of the adverse results that Qwest prognosticates in its reply will occur if the Commission does not grant its petition are actually consequences that are in Qwest's control. Qwest's arguments regarding the enforceability of interconnection agreements that have not yet been approved by state commissions, for example, assumes that there would be a need for enforcement– i.e. that Qwest or another ILEC would somehow violate the agreement – during the pre-approval time period. The Commission should take a dim view of the implicit threats by Qwest to throw a process that has worked well for six years now into chaos by entering into agreements it has no intent to keep.

The simple truth underlying this proceeding is that everyone understands the requirements of Section 252 except, according to Qwest, Qwest.<sup>4</sup> There is no suggestion that any other ILEC has ever engaged in the kind of conduct described in the Department's comments, or that any company other than Qwest believes that the agreement provisions cited by the Department in its comments are anything other than terms and conditions of interconnection that must be filed under §252(a). The silence of other ILECs and RBOCs on this point speaks volumes. In short, the genesis of Qwest's petition is an isolated, albeit somewhat broad, pattern of misconduct by a single ILEC – and Qwest's petition does not raise any questions that need be addressed by the Commission.

Rather than address the question of its inappropriate conduct and the intent of its petition head on, however, Qwest now apparently now "requests," in footnote 49 of its reply comments, that the sections of the Department's Comments addressing that behavior be stricken. This is in keeping with Qwest's secret agreement / Section 271 strategy (outlined in the Department's comments) to prevent regulatory bodies from examining all of the information and evidence relevant to their inquiry into relief sought by Qwest in the first instance.

The Department has found no basis in the Commission's rules for Qwest to make such a request in this type of proceeding. Even if such a request were proper, it certainly would need to be made in some format other than a footnote. In any event, as explained below, the request is unsupported.

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<sup>4</sup> As the various documents produced to the Commission show, however, Qwest fully understood its obligations and affirmatively sought ways to circumvent them.

The Department timely filed its Comments and attachments in this docket, attempting to treat the information designated trade secret by other parties as confidential by filing by mail a version designated as confidential, and a redacted, public version electronically. The Department designated portions of its comments confidential to protect information that other parties designated as trade secret when those parties produced it to the Department. Qwest, in fact, is the party that originally designated the majority of what the Department redacted from its public filing trade secret.<sup>5</sup> McLeodUSA designated the information related to it as trade secret (but has since publicly acknowledged that it is the party with the second discount agreement from Qwest).<sup>6</sup>

On or about June 6, 2002, Steve Alpert, an Assistant Attorney General representing the Department, received a phone call from Mr. Sieradzki, an attorney for Qwest in this matter. Mr. Sieradzki inquired about receiving the confidential version of the Department's filing. In an effort to protect the confidentiality of the comments, Mr. Alpert indicated that he believed Mr. Sieradzki should sign a protective agreement to obtain such access. Mr. Sieradzki stated that there was not a protective agreement yet set up in the docket, but that he would be contacting FCC staff to arrange for it. Mr. Alpert made himself available for follow up by Mr. Sieradzki or the Commission, but heard nothing further on this subject.

Qwest subsequently filed its June 7 motion to extend the time for responsive comments that had been due on June 13. In its request, Qwest never stated that it needed access to the Department's filing in order to respond, nor was the Department advised that this was an ongoing concern.

Moreover, Qwest does have access to the information contained in the filing. As noted above, Qwest actually provided the Department with the majority of the information that is marked as trade secret in the comments. Qwest was also aware from the ongoing Unfiled Agreements Docket that McLeodUSA was the second company referred to in the comments with which, the Department learned, Qwest

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<sup>5</sup> Qwest designated the following documents that are attached as appendices to the Department's Comments trade secret when Qwest produced them to the Department: Appendix B, Appendix D, Appendix E, Appendix F, Appendix G, Appendix J and Appendix L. In keeping with the designation, the Department's discussion of these documents in this proceeding was designated trade secret.

<sup>6</sup> Appendix H and Appendix I contain documents and information initially designated trade secret by McLeodUSA.

entered into a secret agreement for a purchase volume discount from Qwest.

In fact, on June 12, the Department served Qwest with trade secret versions of sworn affidavits signed by a former senior executive at McLeodUSA and the person at McLeodUSA currently responsible for working with Qwest to determine the amount of the discount owed to McLeodUSA. Those affidavits contain even more detail regarding the discount agreement than was available to the Department at the time it filed its initial comments in this docket. Copies are included as Appendix A and Appendix B to this *ex parte* letter to confirm, for the Commission, the accuracy of the Department's initial comments.<sup>7</sup>

As the Commission is aware from the Department's initial comments in this proceeding, the Unfiled Agreements Docket in Minnesota is addressing Qwest's violations of 47 U.S.C. §251 and §252 with regard to the agreements identified in the Department's comments. The two McLeodUSA affidavits attached to this letter, along with every other document that Department has received from McLeodUSA as part of this investigation, were provided to counsel in that action *before* Qwest filed its reply comments in this proceeding. Counsel in that action for Qwest is the same law firm (Hogan & Hartson) that filed Qwest's reply comments in this proceeding. Peter Rohrbach, in fact, is identified as an individual counsel of record in both proceedings.

In short, and despite its protestations to the contrary, Qwest had far more information than the summary provided to this Commission in the Department's filing available to it before it filed its reply comments on June 20.

Qwest's "motion" also states, without any support, that the information in the Department's comment is not firsthand and is being treated as hearsay in Minnesota. That is wholly inaccurate. Every one of the Appendices attached to the Department's initial comments have been accepted into evidence in the ongoing Minnesota proceeding with the exception of Appendices H and I – the documents and information that the Department discovered only after the record was initially

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<sup>7</sup> The Department has submitted both affidavits as exhibits to testimony filed by its consultant in the ongoing examination of Qwest's readiness for Section 271 authority in Minnesota. *See, In the Matter of a Commission Investigation into Qwest's compliance with Section 271(c)(2)(9B) of the Telecommunications Act of 1996*, MPUC Docket No. P421/CI-01-1371; OAH Docket No. 7-2500-14486-2.

closed in the Minnesota proceeding.<sup>8</sup> In short, not one of these documents has been excluded from any proceeding on the basis of a hearsay objection. Moreover, the two affidavits provided to Qwest on June 12 and attached as Appendices A & B to this letter are direct statements of fact from percipient witnesses.<sup>9</sup> Again, neither statement has been precluded from any proceeding based on a hearsay objection or any other objection related to the foundation of the testimony.

As with its original petition in this matter, Qwest has chosen to misstate or gloss over basic facts in an effort to convince the FCC to take action where none is warranted. Qwest's request to strike portions of the Department's comments, as well as its petition, should be denied.

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<sup>8</sup> In addition, the Department's complaint itself, attached as part of Appendix A to the Department's initial comments, was of course not admitted as evidence. Each of the 11 agreements attached to the complaint, however, was accepted into evidence.

<sup>9</sup> On June 27, 2002, Mr. Fisher appeared at a deposition noticed by Qwest and reaffirmed the facts set out in his affidavit.